**STATE OF MICHIGAN**

**IN THE SUPREME COURT**

QUALITY PRODUCTS AND CONCEPTS COMPANY,

Plaintiff-Appellee,

v.

NAGEL PRECISION, INC.

Defendant-Appellant.

Supreme Court No. 119219

Court of Appeals No. 207538

Wayne County Circuit Court
No. 96-612160-CK

# DEFENDANT-APPELLANT NAGEL PRECISION, INC.'S REPLY BRIEF ON APPEAL

**ORAL ARGUMENT REQUESTED**

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QPAC's brief challenges this Court's earlier ruling on its claim for implied-in-law contract and various aspects of the lower courts' rulings that were not preserved for appeal, primarily the dismissal of several alternative theories that QPAC pleaded in its complaint. Those challenges are not pertinent to the issue on which Nagel sought relief from this Court: whether QPAC is entitled to a jury trial on the so-called "waiver" issue. Regarding that issue, QPAC continues to latch on to dicta in various construction-law cases, without addressing our fundamental point: this Court has never found a modification and waiver of a written-modification requirement based solely on a defendant's alleged failure to object to activities of which it knew.

### A. QPAC's Arguments Regarding Its Claims for "Contract Implied in Law," "Contract Implied in Fact," and "Estoppel" Are Not Before this Court.

Recognizing the difficulty it faces on the waiver issue, QPAC now argues at page 1 of its brief that (1) the Court of Appeals erred by failing to "permit[] this case to go forward on all the alternatively pled basis [*sic*], including implied in fact contract, as well as waiver and implied in law contract (quasi contract/unjust enrichment)," and (2) this Court's December 15, 2000 Order summarily reversing and vacating the Court of Appeals' ruling on the "contract implied in law" claim was "absolutely wrong." First, we note that QPAC has failed to preserve any challenge to the trial court's dismissal of claims other than waiver and contract implied in law. To the extent that QPAC had other claims, the Court of Appeals did not disturb the trial court's dismissal of those claims in its March 21, 2000 ruling. (410-418a). In that ruling, the Court of Appeals reversed the trial court's order only to the extent that it dismissed claims based on waiver and a contract implied in law. Because QPAC failed to file a timely application for leave to appeal that ruling, QPAC, as

appellee, is now precluded from asserting that the Court of Appeals erred.[1]

Second, QPAC's challenge to this Court's implied-in-law contract ruling is not proper, because this Court finally disposed of that claim in its December 15, 2000 Order. (458a). Further, QPAC has not presented any plausible reason for this Court to doubt the correctness of its initial ruling. QPAC simply asserts, at pages 1-2 of its brief, that this Court's ruling was "wrong," because the written contract "in no manner addressed the subject sales." That is simply not the case. As discussed in our earlier brief at pages 6-7, an express contract did govern QPAC's sales territory. The Agreement excluded machine tool suppliers from QPAC's territory. (47-61a). Accordingly, QPAC cannot use an implied-in-law contract claim to receive commissions for sales to machine tool suppliers. *Scholz v Montgomery Ward & Co*, 437 Mich 83, 93; 468 NW2d 845 (1991); *Barber v SMH (US), Inc*, 202 Mich App 366; 509 NW2d 791 (1993).

### B. There Was No Modification As A Matter Of Law.

QPAC devotes substantial attention to the question whether a written contract may be modified by a subsequent agreement and whether that agreement can be based upon a course of performance, but does not address the more relevant question of whether the consent necessary to establish a modification can be based solely upon a showing that one party to a contract has notified the other party that it is instituting a different arrangement. As indicated in our earlier brief at page 12, this Court stated in *Wilkinson v Lanterman*, 314 Mich 568, 573; 22 NW2d 827 (1946), that mere silence may not be construed as indicating the consent necessary to form a contract. Thus, Nagel's

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[1] QPAC utterly fails to show that either of the lower courts erred by dismissing claims as duplicative. At page 2 of its brief, QPAC cites *HJ Tucker & Associates, Inc v Allied Chucker & Eng'g Co*, 234 Mich App 550; 585 NW2d 176 (1999), for the proposition that alternative claims "are for the jury to decide." That case merely applies the basic principle that a party may attempt to recover on alternative theories (*see* MCR 2.111(A)(2)). It does not hold that a trial court cannot grant summary disposition dismissing an alternatively pled claim if the claimant cannot establish a genuine issue of material fact.

alleged failure to object to QPAC's unilateral activities, standing alone, would not be legally sufficient to establish a modification.

Despite the plain obstacle that rule poses for QPAC's position, QPAC would have this Court hold that a jury trial is required whenever a party to a contract makes a self-interested allegation, based solely upon their own conduct, that a modification has occurred. That would be a stark departure from the existing decisions of this Court; it is in fact supported by none of the decisions of this Court cited by QPAC at pages 10 and 11 of its brief. For example, *Jacob v Cummins*, 213 Mich 373; 182 NW 115 (1921), stated the basic proposition that a modification to a written agreement can be predicated upon the ***acts*** of the parties. *Jacob* does not say that a modification could be established based upon the inaction of the party contesting the modification. Similarly, *Morley Brothers, Inc v FR Patterson Constr Co*, 266 Mich 52; 253 NW 213 (1934), held that a plaintiff could recover compensation for "extras" furnished at the direction of the defendant's representatives, even though the parties' written contract stated that it could not be changed but by agreement in writing. Again, *Turner v Williams*, 311 Mich 563; 19 NW2d 100 (1945), held that a time of performance provision could be modified or waived by statements of the waiving party that strict time of performance would not be required. And *Strom-Johnson Constr Co v Riverview Furniture Store*, 227 Mich 55; 198 NW 714 (1924), held that a modification of the time of performance in a construction contract could be found where the owner failed to provide water and space for the builder's operations and ordered the builder to perform extra work. In sum, those cases reflect a consistent pattern that modifications can be found only when the party contesting the modification has authorized the performance of work beyond the scope of the parties' agreement.

QPAC also claims that the terms of a contract modification can be evidenced by a course of performance, apparently suggesting that its unilateral action here constituted such a course of performance. Nagel does not dispute the legal premise that a course of performance can assist in the

interpretation of ambiguous contract terms. Nagel does, however, reject the notion that one party's unilateral conduct can establish a course of performance that can obviate the mutual consent required to establish a contract modification. The cases cited by QPAC in support of this argument (pages 16-17 of its brief) are inapposite. *Donovan v Halsey Fire-Engine Co*, 58 Mich 38; 24 NW 819 (1885), merely held that a defendant could not repudiate liability for services rendered by the plaintiff with the defendant's authorization, despite the defendant's subsequent claim that its by-laws prevented it from agreeing to pay for the services. *Strong v Sanders*, 15 Mich 339 (1867), involved suit to recover compensation for use of certain range lights provided by the plaintiff for the guidance of the defendant's steam tug. This Court held that the suit was justified where the defendant had agreed to pay whatever his captain deemed a reasonable sum and had paid for those services in prior years. In *State Bank of Standish v Curry*, 442 Mich 76; 500 NW2d 104 (1993), this court held that the trial court did not err in leaving the question of the existence of a "clear and definite" promise to loan money to the jury, which was necessary to establish a promissory estoppel claim, where the evidence showed that the bank had promised to provide support and the terms of loan could be supplied from a history of loan practices between the parties.[2] Again, those cases are consistent with our position here, which is that a court cannot infer a modification of an agreement from inaction; those cases all involved affirmative conduct by the part contesting the modification.

Finally, QPAC argues at page 18 of its brief that silence and inaction can give rise to an implied contract "under circumstances that impose a duty to speak or act." The cases cited by QPAC do not suggest that any such duty to speak arose under the facts of this case. At most, these cases indicate that such a duty may arise when the traditional elements of equitable estoppel are

[2] QPAC quotes Restatement (Second) of Contracts § 202(4), in support of its "course of performance" argument. However, that provision relates to the interpretation of contract terms and does not apply to the question of whether a contract has been formed. *See* Restatement (Second) of Contracts § 200, cmt. a.

met. *See, e.g., Kole v Lampen*, 191 Mich 156; 157 NW 392 (1916) (defendants could be estopped from claiming that note provided to plaintiff was forged, where they allowed the forger (their son) to testify to the authenticity of the note in a separate action at which they were present); *Inglis v Millersburg Driving Ass'n*, 169 Mich 311; 136 NW 443 (1912) (association estopped from asserting defense of nonliability due to independent contract, where the association continuously made misrepresentations to the property owners about their responsibility for adjoining land); *Lakeside Oakland Development, LC v H & J Beef Co*, 249 Mich App 517; 644 NW2d 765 (2002) (sellers estopped from asserting lack of writing to satisfy statute of frauds regarding buyer's claim that easement was part of transaction, where intent to transfer easement was reflected in various written documents executed by sellers and buyer had begun construction); *Conagra, Inc v Farmers State Bank*, 237 Mich App 109; 602 NW2d 390 (1999) (estoppel theory premised on inaction was ***not*** applicable). As with the other lines of cases discussed above, none of those cases has found liability of the party contesting the obligation without some affirmative action of the party supporting the implication of the obligation.

In sum, QPAC's unsuccessful efforts to inject course of performance and equitable estoppel issues into this case only underscore the basic and unrebutted point of our position: QPAC has failed to make allegations that contain the crucial element of mutual assent.

### C. The Written Modification Requirement Rendered Any Alleged Implied Modification Ineffective As A Matter Of Law.

Even if QPAC could establish that a modification occurred, QPAC cannot show that it complied with the written modification requirement contained in the Agreement. As explained in our earlier brief at pages 14-15, Michigan courts routinely enforce such clauses. QPAC, however, building on its underlying contention that Nagel's silence amounts to the modification itself, goes on to argue that the same silence also amounts to a waiver of the written modification requirement.

That argument ignores a substantial body of Michigan law regarding waiver as well as the broad language of the particular contractual provision that the parties drafted in this case.

### 1. The Requirements for a Waiver

As our earlier brief explained at pages 15-17, Michigan law finds a waiver only upon a decisive act; mere silence or inaction is inadequate. *Roberts v Mecosta County Gen Hosp*, 466 Mich 57, 67-68; 624 NW2d 663 (2002). At page 22 of its brief, QPAC tries to distinguish this Court's recent decision in *Roberts* because it involved "the statutory construction of a statute and not the course of conduct in a commercial setting by business entities." However, QPAC offers no reason why the waiver doctrine would work differently in the context of the waiver of a right to challenge deficiencies in a notice of intent to sue and a waiver of a contractual written-modification requirement. In any event, *Roberts* does not support the perceived distinction. *Roberts* was not based on a unique statutory definition of the term "waiver"; rather, the waiver analysis in *Roberts* rested on the definition this Court has used in commercial and criminal cases—i.e., the "intentional relinquishment of a known right." *Compare Roberts*, 466 Mich at 65; *People v Carines*, 460 Mich. 750, 762, n 7; 597 N.W.2d 130 (1999); and *Book Furniture Co v Chance*, 352 Mich 521, 526; 90 NW2d 651 (1958).

### 2. Anti-Waiver Provision

QPAC has no substantial response to our argument that paragraph 11 of the Agreement expressly rejects the argument for waiver that they advance in this case. First, it tries to contend that the provision is not relevant or applicable to this case.[3] For example, QPAC claims at page 8 of its

[3] QPAC also complains at page 6 of its brief that the anti-waiver provision has not been a "point of contention" in the lower courts. Admittedly, when Nagel filed its summary disposition motion, it did not anticipate that waiver would become a key issue; it was QPAC that inserted that issue. However, the waiver issue has since been extensively briefed—in the trial court, the Court of Appeals and in the applications filed in this Court. The anti-waiver provision itself merely bolsters the conclusion that the written-modification requirement should be enforced. But, as stated in our previous briefs in this Court and the lower courts, QPAC has not established a waiver of the

Brief that the anti-waiver provision is irrelevant because it lacks mutuality of obligation. According to QPAC, paragraph 11 is invalid because it gives rights only to Nagel. This argument is so ludicrous that it hardly merits response. First, it is firmly established that if the requirement of consideration is met, there is no additional requirement of mutuality of obligation. *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579, 600; 292 NW2d 880 (1980); *see also* Restatement (Second) of Contracts § 79(c). And, it is equally well established that the requirement of consideration involves a return promise or a performance; it does not involve the exchange of identical promises or performances. *See* Restatement (Second) of Contracts § 71; *see also General Motors Corp v Department of Treasury*, 466 Mich 231, 236; 644 NW2d 734 (2002). Finally, there is no support for the notion that each provision in a contract must be reciprocal. If the entire contract is supported by consideration, there is no requirement that each provision be analyzed independently.

QPAC also argues at page 8 of its Brief that the language of the anti-waiver clause states that Nagel may demand future exact compliance where it has waived a previous default of QPAC. According to QPAC, the provision does not apply here because QPAC was never in default under the terms of the Agreement. The clause, however, applies not only to the concept of successive defaults, but also to the requirements for finding a waiver of Nagel's rights to demand exact compliance with the terms of the Agreement in the first instance. It says that "[n]o delay, omission or failure of Nagel to exercise any right or power under this Agreement or to insist upon strict compliance by [QPAC] of any obligation hereunder . . . shall constitute a waiver of Nagel's rights to demand exact compliance with the terms" of the Agreement." (55a) The clause goes on to say that no such failure shall affect the rights of Nagel regarding any subsequent default of QPAC. *Id.*

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written-modification provision under Michigan law, without regard to the presence of the anti-waiver provision.

Thus, QPAC's interpretation of the Agreement is flawed. More importantly, the provision does not apply only to defaults by QPAC in its performance of its obligations as a sales representative. It also applies to a delay, omission or failure by Nagel to exercise any right or power under the Agreement. In that case, the clause makes clear that any "delay, omission or failure" of Nagel to exercise the written-modification requirement cannot be deemed to constitute a waiver of Nagel's rights to demand compliance.

Finally, QPAC cites *Formall, Inc v Community Nat'l Bank of Pontiac*, 138 Mich App 588; 360 NW2d 902 (1984). Nagel's earlier brief discussed the doubtful validity of that decision outside the context of credit notes. Nevertheless, QPAC has made several misstatements about that case that require response. First, QPAC asserts that the *Formall* case mandates a trial–even in the presence of an anti-waiver provision–every time a plaintiff alleges that a waiver has occurred. As our earlier brief explained, the court in *Formall* expressly rejected that proposition. The court recognized that a jury question would ***not*** exist in every situation where a lender had accepted late payment and that "[t]here reasonably must be a threshold below which the 'anti-waiver' clause is protection for the bank." 138 Mich App at 603. Second, QPAC mischaracterizes the decision in *Westinghouse Credit Corp v Shelton*, 645 F2d 869 (CA10, 1981), on which the *Formall* court relied, by suggesting that the issue of waiver of an "anti-waiver" clause is always a triable issue. Like *Formall*, *Westinghouse* involved the application of an anti-waiver clause in the context of a credit note. The lender suddenly declared a default and attempted to accelerate the note after it had accepted late payments for a period of about 3½ years. The district court granted summary judgment to the lender based on the anti-waiver provision, but the Tenth Circuit reversed. Applying the Oklahoma Uniform Commercial Code, sections 2-208 and 2-209, the court held that an anti-waiver provision itself could be waived by a course of performance such as the facts of that case evidenced.

Here, of course, there was no course of performance. There is no claim that Nagel ever paid

commissions on the sales at issue and then suddenly disavowed any obligation to make similar payments in the future. Here, construing the evidence most favorably to QPAC, the most that can be shown is that Nagel was aware that QPAC was calling on machine tool suppliers and that Nagel failed to object. There is simply no authority for the dubious proposition asserted by QPAC that a person that receives a proposal to change an agreement is obligated to answer. Indeed, as we discuss above, there is quite a considerable body of authority to the contrary.

### 3. Cases Involving Waiver of Written Modification Requirements

QPAC devotes a page of its brief to a block quote from this Court's decision in *Klas v Pearce Hardware & Furniture Co*, 202 Mich 334; 168 NW 425 (1918). As Nagel has emphasized to this Court in our numerous previous filings in this matter, QPAC's reading of the case completely ignores the facts that were the basis of the *Klas* holding. *Klas* cannot plausibly be read to support the proposition that a party to a written agreement can unilaterally modify the agreement by informing the other party that it is performing additional work. Also, as we explained in our earlier brief at pages 24-25, this Court later held in *Banwell v Risdon*, 258 Mich 274, 278-79; 241 NW 796 (1932), that such a requirement "places upon plaintiff the burden of establishing by convincing evidence that changes charged for and not authorized in writing were in fact authorized by verbal agreement, inclusive of full understanding of call for payment thereof." At pages 13-14 of its brief, QPAC makes the bizarre argument that a *verbal* agreement is somehow different from an *oral* agreement. That distinction is meaningless: nothing in the record suggests that Nagel made any agreement of any kind–oral, verbal, electronic, or written–that covers the sales in question. In addition, none of the definitions to which they refer suggests that any category of "verbal or oral" conduct would include silence. Their efforts to distinguish "verbal" and "oral" agreements are

irrelevant.[4]

Finally, at page 15 of its brief, QPAC notes that some of the waiver cases cited by Nagel were decided on appeal after a trial, not as a result of an appeal from a summary disposition. As discussed above and in our earlier brief, trial was warranted in those cases because there was evidence of an oral directive by the defendant that additional work by performed. Here, there is no allegation that Nagel asked QPAC to call on customers outside its territory. Instead, the only factual dispute relates to Nagel's response to the reports of QPAC's unilateral efforts to expand its territory. That is not a material fact that would warrant a trial. Nagel's alleged failure to object to QPAC's unilateral activities, standing alone, would not be legally sufficient to establish a modification and waiver of a written-modification requirement.

## CONCLUSION

Although this Court summarily reversed the Court of Appeals ruling on the contract implied-in-law doctrine, QPAC continues to challenge that ruling. That challenge is procedurally improper and legally insufficient. Regarding the issues actually before this Court—whether Nagel agreed to modify the contract and whether Nagel waived the written-modification requirement—QPAC does not directly challenge the firmly established legal principles that our earlier brief elucidates. Rather, QPAC's Brief in Response is a compilation of lengthy block quotes taken from cases that do not support the positions QPAC urges here. Thus, QPAC makes no real effort to refute the principles articulated in our earlier brief.

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[4] QPAC errs in arguing that *Cascade Elec Co v Rice*, 70 Mich App 420; 245 NW2d 77 (1976), has rejected *Banwell*. Putting to one side the dubious assertion that the Court of Appeals could have overruled the decision of this Court in *Banwell*, *Cascade* does not support QPAC's argument. In that case, there was substantial testimony that the defendant directed that contractual changes be made. Here, as we have explained so many times, QPAC does not allege that Nagel directed it to perform extra contractual work. The dictum that QPAC cites that discusses *Banwell* is neither relevant to the holding in that case nor relevant to the question whether a defendant's failure to object to activities is enough to waive a written modification requirement.

QPAC essentially asks this Court to create new law to the effect that a party's silence is triply effective: to bind it to a contract, to waive a written-modification requirement, and even to waive a specific contractual provision indicating that silence should not be construed as a waiver or modification of the contract. This Court should not countenance that extravagant request.

## RELIEF REQUESTED

WHEREFORE, Appellant Nagel Precision, Inc. respectfully requests that the Supreme Court reverse the Court of Appeals April 24, 2001, Opinion.

Respectfully submitted,

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